

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Nogales, Vail and Patagonia, Arizona))

MM Docket No. 00-31/
RM-9815
RM-10014
RM-10095

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Big Broadcast of Arizona, LLC ("BBA"), by its attorney, pursuant to Section 1.115(d) of the Commission's rules, hereby respectfully replies to the January 23, 2002 Opposition filed by Desert West Air Ranchers Corporation ("Desert West") to BBA's January 8, 2002 Application for Review of the Report and Order, DA01-2735, released November 22, 2001 ("Report and Order") in the captioned matter.

In response thereto, the following is respectfully shown:

1. BBA's Application for Review raised three fundamental issues, none of which has been rebutted or meaningfully addressed in Desert West's Opposition.

2. BBA's first argument was that Desert West's initial proposal (that is, the move of station KZNO (FM) from Channel 252A at Nogales, Arizona to Channel 253A at Vail, Arizona) did not comprise viable rulemaking. As BBA noted, Section 1.420(i) of the Commission's rules requires that a licensee's request to modify its license through rulemaking must be mutually exclusive with the licensee's present assignment. BBA specifically noted that Desert West contrived a spacing conflict by selecting a hypothetical "special reference point coordinate" site only slightly short-spaced to its existing assignment, whereas other sites would have permitted the existing and proposed channels to coexist with full spacing. Application for Review at ¶ 10.

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3. In response, Desert West defends its choice of site on purely commercial grounds.¹ However, the extent of Commission deference to a petitioner's site preference is not absolute.² Here, there was a compelling reason to override Desert West's choice of site – the fact that it entailed the removal of KZNO from Nogales and a consequent substantial loss of service, while other acceptable sites would avoid these detriments by permitting KZNO to continue serving Nogales while still allowing implementation of a new first service to Vail.³

4. BBA's second issue for review was that Desert West's "suggestion" to use this procedure as an opportunity to allot a new channel to Patagonia, Arizona was not a viable counterproposal, insofar as it was not mutually exclusive with the Notice of Proposed Rule Making herein, 15 FCC Rcd 4323 (2000).

5. Desert West's only response is to claim that "the Patagonia allotment was not decisionally significant" and that the staff "did not, in fact, rely on a first local service at Patagonia in its public interest determination." Desert West Opposition at ¶ 10. That simply is not true. The staff specifically awarded a preference for Desert West's proposal to provide a first local service at Patagonia under Priority 3 (Report and Order, ¶ 9, third to last sentence).

¹ The factors recited by Desert West are an existing tower location, cost of the land for purchase or lease, FAA concerns, favorable terrain and the desire to reach a populated area. Desert West Opposition at ¶ 7. However, Desert West does not suggest that any of these potential factors applied to its site selection here.

² Indeed, the case cited by Desert West for this proposition – Eufala, Oklahoma, 12 FCC Rcd 3743 (1997) only states that: "Generally, the Commission does propose the allotment of channels which are to be used by existing stations at the coordinates specified in the Petition for Rulemaking." Id. at ¶ 3, emphasis added.

³ By contrast, in Eufala, Oklahoma, *supra.*, the sole authority cited by Desert West in this section of its argument, the Commission was faced with an essentially unopposed rulemaking (the only counterproposal having been dismissed on a procedural matter), whereas in the instant case BBA presented the Commission with a viable alternative through its counterproposal to allot a new channel to Vail while maintaining KZNO's existing service to Nogales.

Moreover, two-thirds of the staff's calculation of the net population gain to be expected from Desert West's proposal was attributable to the Patagonia proposal (Id. at second to last sentence).⁴

6. Nor do the two cases cited by Desert West in this portion of its argument support its contention. Indeed, in Moberly, Missouri [Desert West gives no cite, but presumably was referring to 2001 FCC Lexis 6476, released November 30, 2001], the Commission specifically found that a counterproposal for first service to Madison, Missouri "was in conflict with the originally proposed... allotment..."⁵

7. In any event, even though its interpretation of the Report and Order is factually incorrect, by contending that Patagonia has no decisional significance in this case Desert West appears to concede BBA's argument that Patagonia in fact should not have been considered.

8. BBA's final point was that while its counterproposal was entitled to be considered for a *first* service at Vail (thereby triggering Priority 3), the Report and Order treated it as for only a *second* station at Vail (that is, coming after Desert West's) and therefore of lower priority (#4). In support of the Report and Order, Desert West relies upon a claimed "proposition that when two proposals for the same community are pending, the first to file is entitled to the first local service preference." Opposition at ¶ 9. There is in fact no such policy.⁶ On the contrary,

⁴ Specifically, the staff calculated a net population gain of approximately 24,564 persons, of which only 8,181 arose from Vail and 16,383 arose from the Patagonia proposal. Without Patagonia, the net gain would have been overwhelmed by the loss of a fifth full time reception service to 10,342 persons.

⁵ The only other case cited by Desert West (and also relied upon by the staff in Note 11 of the Report and Order) – Wickenburg, Bagdad and Aguila, Arizona, 16 FCC Rcd 7970 (2001), recon. granted [on other grounds] 16 FCC Rcd 15793 (2001) – suggests that a proposal to allot a first service to a new community can be deemed "an interrelated component" and thus function as a counterproposal (Id. at ¶ 6). BBA respectfully suggests that Wickenburg, supra., is in conflict with Moberly, Missouri, supra., as well as the other cases cited at ¶ 11 of BBA's Application for Review (requiring that a counterproposal be mutually exclusive with the initial proposal) and therefore should not be followed.

the entire rationale for permitting counterproposals is to create a date by which all competing proposals are to be considered on an equal footing. It is not a matter of determining whether any subsequent counterproposal can displace the first to be filed, but whether which among them all are found to best serve the public interest.

9. The two cases cited by Desert West for its fictitious policy held nothing of the sort. Galveston and Missouri City, Texas, 16 FCC Rcd 747 (2001) involved two *separate* proceedings (the first of which, of course, was entitled to protection against the second), rather than a proposal and a timely counterproposal in the *same* proceeding. Nor was Desert West's novel theory cited as a basis for decision in Paonia and Olathe, Colorado DA01-2909, released December 14, 2001; on the contrary, there the staff preferred a counterproposal to an improperly amended initial rulemaking proposal.⁷

10. As demonstrated by BBA in its Application for Review, there was no basis whatever for the staff to have considered Desert West's proposal for Vail to have been for a first local service and BBA's counterproposal for only a second. Rather, the staff should have compared their respective public interest benefits and found that BBA's counterproposal was preferred as it would result in the very same first service to Vail while avoiding the detriment of a loss of service at Nogales.

(..continued)

⁶ BBA notes that Desert West's counsel devoted many years of excellent service as Chief of the Commission's Allocations Branch and therefore his expertise in this area of law is entitled to considerable deference. Nonetheless, this case does not require new policy paths to be blazed, but rather adherence to past precedent, as contained in past Commission cases. Therefore, as superficially appealing as they might appear to be, Desert West's unsupported statements of purported policy do not overcome the manner in which the underlying staff decision departed from the binding precedent of the Commission's published rules and cases.

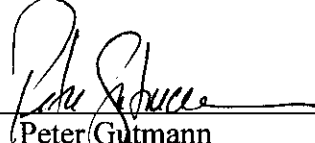
⁷ As ostensible further precedent, Desert West cites Harrisburg and Albemarle, North Carolina, 7 FCC Rcd 108 (1992) as an instance in which the first proposal to be filed happened to be preferred, but this was merely coincidence and had nothing to do with the order in which the proposals were filed, but rather their respective public interest merits.

11. One further matter – at ¶ 6 of its Opposition, Desert West questions why BBA should be dissatisfied with the staff's decision to award a second channel to Vail for which BBA (and others) could apply. The answer is obvious – Vail is a small community; while it has need of a first local outlet, a second might not be viable. The Report and Order would allow KZNO to provide immediate service to Vail while delaying applications for the second channel pending the opening of an application window (which, based upon present substantial delays engendered with the first FM application window, could be a very long way off). Thus, Desert West's stratagem will result in an unfair and underserved competitive advantage.⁸

12. As demonstrated herein, Desert West's Opposition fails to rebut the arguments raised in BBA's Application for Review. Therefore, for the reasons stated therein, the relief requested in the Application for Review should be granted.

Respectfully Submitted,

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February 5, 2002

⁸ It is hardly shocking that most participants in rulemaking proceedings for new commercial channels are motivated by commercial factors. Indeed, Desert West devotes the very next paragraph of its Opposition to a suggestion that commercial factors led it to choose its preferred site.

CERTIFICATE OF SERVICE

I, Regina S. McFadden, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 5th day of February, 2002, copies of the foregoing Application for Review were mailed, postage prepaid, to the following:

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